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IN THE

Supreme Court of the United States

October Term 1974

No. 74-286

THEODORE O. BATES, *Petitioner*,

v.

PRUDENTIAL-GRACE LINES, INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

A.

Is a seaman, leaving his ship on shore leave, precluded as a matter of law from recovering damages under the Jones Act for injuries sustained in a fall in a hole on the dock not owned or legally "controlled" by the shipowner, when the place of injury is not in the immediate vicinity of the gangway?

B.

Is a seaman, under the Jones Act, afforded equal rights of recovery to those granted to a railroad worker under the FELA; or is the FELA, when applied to seamen, to be interpreted in light of the basic differences in working conditions of the two occupations?

C.

Was the plaintiff wrongfully deprived of his right to a jury trial by the judgment N.O.V. entered by the lower court, based upon a conclusion that the shipowner had no duty to the plaintiff who was on shore leave and was injured 580 feet from the ship's gangway on premises over which the shipowner had no dominion or control?

II.

SUPPLEMENTAL STATEMENT OF THE CASE

While petitioner has, in most respects, fairly stated the case, the following additional facts should be brought to the court's attention in order to place this case, and its issues, in proper perspective.

The pier in question was neither owned, operated, maintained nor controlled by the shipowner or its agents. (R. at 5-6; R. at 19, ll. 16-18; R. at 148, ll. 20-22.) Rather, the pier was owned, operated, maintained and controlled by Empressa Portuaria de Chile, an entity of the Government of Chile. (R. at 148, ll. 21-22; Tr. 99, ll. 5-9.)

Petitioner's purpose in being upon the pier on the occasion of his injury was for purely personal reasons and not in the performance of his work as a seaman (Tr. 52 ll. 10-25; Tr. 100, l. 22; Tr. 101, l.5). Petitioner, who has been a merchant seaman since 1945 (Tr. 2, ll. 9-17), intended "to go up town and see how other people live." (Tr. 52, ll. 13-14.) In summary, petitioner was on shore leave, not on ship's business. There is no *requirement*, statutory or otherwise, that shore leave be granted to the crew. To the contrary, as evidenced by the testimony of petitioner's expert

witness, the granting of shore leave is discretionary (Tr. 120, ll. 1-10; Tr. 126, ll. 17-21).

The hole into which petitioner stepped was not in the immediate area of the gangway. The hole was located by petitioner some 580 feet from the end of the vessel's gangway. (The gangway was located amidships of a vessel roughly 525 feet long [Tr. 104, ll. 12-23]. From the stern of the vessel east to the end of the pier was approximately 300 feet [Tr. 59, ll. 5-8; Tr. 60, ll. 4-9] The hole was approximately twenty feet beyond the furthermost edge of the pier [Tr. 21 ll. 21-22].) The vessel's master placed the hole somewhat closer, about 450 feet from the gangway (Tr. 105, ll. 5-12).

The pier area from the gangway to the main gate was not a narrow path which one must necessarily traverse. Rather, the area was amply wide so that one could choose his own route almost without limitation. The vessel was docked parallel to the face of the pier in a generally east-west direction, the bow heading west (Tr. 72, ll. 12-13). The gate was east. Warehouses paralleling the face of the pier were 40 to 50 feet to the south. (Tr. 72, l. 22; Tr. 73, l. 10; Tr. 19, l. 25; Tr. 21, l. 2), although in this area there were railroad tracks about 12 feet south of, and parallel to, the face of the pier. However, the accident itself occurred further east, about 20 feet from the edge (not the face) of the pier. In this area where the injury occurred, the available "path" to the gate was about 1000 feet wide (Tr. 49, ll. 1-8; Tr. 96, l. 14; Tr. 97, l. 5).

The hole itself was not concealed but was, in fact, open and obvious to even the most casual observer. The hole was about 18 inches in diameter (Tr. 22, ll. 3-5; Tr. 87 ll. 2-3).

As previously described, the hole was located in an open rather than a confined area. It was daylight at the time of the injury and visibility was no problem (Tr. 48, ll. 3-9; Tr. 83, ll. 1-2). The vessel's master had seen the hole from some 15 to 20 feet away (Tr. 100, ll. 10-18). Petitioner himself was aware prior to the accident that there were other holes on the pier (Tr. 19, ll. 13-24).

III.
ARGUMENT

A.
Traditional Grounds for Granting Certiorari Are Not Present

1. A well established ground for granting a writ of certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review. It has been stated generally that certiorari will usually be granted when there is a conflict between courts of appeals on the same matter of *federal* or *general* law, the obvious purpose being to secure uniformity between the various courts.

A careful reading of the petitioner's brief fails to reveal the presentation of any conflicts between courts of appeal on the precise factual situation existing in this case. The many citations of FELA cases are inapposite, since service aboard a vessel and necessary work done in its environs can in no way be analogized to the duties of a railroad worker, particularly in fulfilling his many functions required in and about the employer's premises when not actually aboard a train.

The petitioner actually admits the absence of a conflict between circuits as follows:

> "Despite the obvious infirmities of Todahl, it has been followed in other circuits." (Petitioner's Brief p. 21)

The *Todahl* case to which he refers is that upon which the appellate court based its ruling and will be more fully discussed below.

2. Similarly, the *importance* of the issue involved has been said to be of major significance in determining whether the writ will issue. Importance is a relative matter, but in this concept it has been held to mean importance "to the public as distinguished from" importance to the "parties" involved. *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393.

The respondent would agree that it possibly could have breached a duty to seaman Bates if the hole in the dock had been "in the immediate vicinity" of the gangplank, to employ an expression used in the many cases cited below. But the hole into which Bates fell was 580 feet from the gangway. The "importance" of the case cannot justifiably be based on the distance differential between the "immediate vicinity of the plank" and the point of injury 580 feet from the plank. Certiorari was not intended to, nor has it been used to, grant review of such a miniscule factual variation.

B.

The Petitioner's Cause of Action Is Derived From FELA But He Is in *Maritime* Employment

Petitioner has urged that the shipowner is required to furnish a safe place to work on premises over which the

shipowner has no control because (1) recent railroad (FELA) cases so hold, and (2) seamen and railroad employees have "identical" rights. This argument fails to consider the fundamental fact that the very nature of a railroad worker's employment precludes equation with a seaman on shore leave. The circumstances of employment are simply not comparable. As succinctly stated in *Vickers v. Tumey*, 290 F.2d 426, 429-30 (5th Cir. 1961):

> "Of course with a statute transplanted from the switchyard to navigable waters, it would be doctrinaire to suggest that incorporation of FELA by the Jones Act necessarily brought along identical standards and application. It would be clearly wrong because it would ignore the essential differences in conditions and circumstances of employment. . . ."

The very argument which petitioner has advanced on this point was expressly rejected in the recent case of *Dixon v. Grace Lines, Inc.*, 27 Cal. App. 3d 278, 103 Cal. Rptr. 595, 602 (1972):

> "Plaintiff contends defendant was under a duty to provide him with a safe place in which to work, including safe means of ingress and egress to and from the vessel. In support of this contention he cites cases which hold that under the Federal Employer's Liability Act a railroad has the nondelegable duty to provide its employees with a safe place in which to work even when they are required to go onto the premises of a third party over which the railroad has no control. [Citations.] It is true that the Jones Act incorporates the standards of the Federal Employers' Liability Act in determining the employer's liability for injuries negligently inflicted on its employees. [Citation.] However, because of the essential differences between the conditions and circumstances of employment in the railroad industry and the maritime shipping industry, such incorporation did not necessarily bring along identical standards and application of the Federal Employers' Liability Act in Jones Act cases. . . ."

C.

A Shipowner Has No Duty to Protect a Seaman on Shore Leave From Hazards Beyond the Immediate Area of the Gangway on Premises Over Which the Shipowner Has No Control

Petitioner bases his cause of action on the Jones Act (46 U.S.C. ¶688) which, through its incorporation of the Federal Employers Liability Act (45 U.S.C. ¶51), allows a seaman to sue his shipowner/employer for *negligence*.

It is axiomatic that in order for a defendant to be liable for negligence, a duty *which the defendant* owes to plaintiff must be breached:

> "The essential elements of actionable negligence include the existence of a duty *on the part of the defendant* to protect the plaintiff from injury, failure of the defendant to perform that duty, and injury to the plaintiff resulting from such failure." [Emphasis supplied] 65 C.J.S. *Negligence*, §2(1), p. 464 (1966).

These principles are also applicable to the Jones Act:

> ". . . [The Jones Act] does not make that negligence which was not negligence before, does not make the employer responsible for acts or things *which do not constitute a breach of duty.*" *DeZon v. American President Lines, Ltd.*, 129 F.2d 404, 407-08 (9th Cir. 1942) (emphasis added), *aff'd.* 318 U.S. 660 (1943).

It is obvious from the foregoing that the first question presented in this appeal is whether a shipowner has any duty at all to protect a crew member on shore leave from hazards beyond the immediate area of the gangway on premises over which the shipowner has no control.

This precise question was earlier presented to the court below in *Todahl v. Sudden & Christenson*, 5 F.2d 462 (9th Cir. 1925).

In *Todahl*, plaintiff crew member sustained injury when he stepped into a hole on an unlighted wharf. He brought suit against his employer and against the owner of the wharf for damages, alleging negligence in that defendants had failed to advise him of the unsafe condition of the pier. Even though the vessel was operating under charter or contract with the pier owner, the court sustained the shipowner's demurrer to plaintiff's allegations. In the course of its opinion, the court set forth the limitations on the duties owed a seaman on shore leave under facts analogous to those of the case at bar:

> ". . . The complaint shows that at 5 o'clock in the afternoon the plaintiff obtained permission to go ashore on business of his own, that he went ashore over the wharf whereby he must have had opportunity to observe its construction, and that at midnight he was returning over the wharf on his way to the ship when the accident occurred. It is argued that the plaintiff was injured while in his employer's service, inasmuch as he was under obligation to return to the vessel and was required to pass over the wharf. It is true, as we held in *Lamphere v. Oregon Nav. Co.*, 196 F.336, 116 C.C.A. 156, 47 L.R.A. (N.S.) 1, than an employee is in the service of his master whenever he is doing that which under his contract of employment he is bound to do. But here the plaintiff, in voluntarily going ashore, and thus by his own act making his return necessary, was not doing that which his contract of employment bound him to do. The owners of the steamship owed him the duty of providing a safe place in which to perform his work as a seaman. *That duty did not extend to his protection when going beyond the premises of his employment for the purpose of his own and over premises of which his employer had no dominion or control. . . .*" 5 F.2d at 464 (emphasis added).

In the instant case, the trial court relied upon *Todahl* in granting defeandant's motion for Judgment Notwithstand-

ing the Verdict. (Memorandum Opinion, R. 220-226). Reliance by the trial court on *Todahl* as binding precedent is well-founded, as evidenced by the unanimous adoption of the *Todahl* principle by other circuit courts which have considered the issues presented in this appeal.

The Second Circuit first considered the question in *Wheeler v. West India S.S. Co.*, 103 F. Supp. 631 (S.D.N.Y. 1951), *aff'd. per curiam*, 205 F.2d 354 (2d Cir. 1953), *cert. denied*, 346 U.S. 889 (1953). In *Wheeler*, the plaintiff was an engineer aboard defendant's vessel which was docked at the end of a viaduct extending about one mile into the sea at a port in France. During daylight plaintiff went ashore on shore leave by means of the viaduct, which was in a state of disrepair as a result of wartime bombing. Later that night, plaintiff was returning to his vessel on the viaduct, which was unlighted. He was struck by a train which was apparently being operated in a negligent manner. The district court, setting aside a jury verdict in favor of plaintiff in an opinion adopted by the appellate court, stated:

> "Though the defendant was duty-bound to provide reasonably safe means of immediate access to the vessel [citations], shipowners have generally been held not liable for unsafe conditions in places beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties [citations]." 103 F.Supp. at 634.

The issue was again raised in *Dangovich v. Isthmian Lines, Inc.*, 218 F. Supp. 235 (S.D.N.Y. 1963), *aff'd.*, 327 F.2d 355 (2d Cir. 1964). The court dismissed plaintiff's action, brought under general maritime law and the Jones Act, for injuries sustained when he fell from a narrow, unguarded railroad trestle while returning to the vessel

from shore leave in an Iranian port. The court concluded that the defendant shipowner had no duty to provide plaintiff while on shore leave with a safe means of egress or access to the vessel beyond the gangway, and that the defendant had no duty to warn seamen of dangers existing beyond the gangway. In granting judgment to the defendant, the court noted:

> "Subsequent cases have reaffirmed the rule that there is no duty on the shipowner to provide safe means of access or egress (beyond the gangway) to seamen on shore leave. . . ." 218 F. Supp. at 237.

The issue was again raised in *D'Costa v. United States Lines Co.*, 225 F. Supp. 180 (S.D.N.Y. 1964), wherein a crew member sustained injury when he slipped while descending stairs between a street and a pier in Spain. Plaintiff, returning to the vessel from shore leave, claimed that the stairs, which were located several hundred yards from the dock area, had no handrails and inadequate lighting. The court granted the shipowner's motion for summary judgment both as to unseaworthiness and negligence:

> ". . . The law is clear that a ship owner is not under a duty to warn crew members who are going ashore for their own pleasure of the existence of possible dangerous conditions in a shore area beyond the ship's control. [Citations]" 225 F. Supp. at 181.

The Court of Appeals for the Third Circuit considered the issue in *Paul v. United States*, 205 F.2d 38 (3d Cir.), *cert. denied*, 346 U.S. 888 (1953). The plaintiff seaman in *Paul* sustained injury in Italy when he stepped into a recess on a narrow, unlighted, unguarded area with no railings located on the pier about 100 feet beyond the bow of the vessel. The court posed as the issue the following question:

> "Other than in the immediate vicinity of the vessel's

> gangplank, is a shipowner under a duty to provide safe means of passage from or to the vessel over a dock area over which the shipowner has no control and/or to inspect and give warning to the conditions prevailing along the dock's passageway?" 205 F.2d at 38.

The court answered the question in the negative, concluding that no such duties existed.

The court in *Paul* also explicitly rejected the plaintiff's argument (also advanced by petitioner herein) that "the duty to provide a safe means of ingress to, and egress from, the vessel is part and parcel of the traditional duty on the part of a vessel to provide its seamen with a safe place in which to work."

Apparently, no other circuit court has explicitly ruled on the question presented in this appeal. A somewhat analogous situation was presented to a district court in the Fourth Circuit in *Lemon v. United States*, 68 F. Supp. 793 (D.Md. 1946), involving a seaman who was asphyxiated by carbon monoxide which had accumulated in the cabin of a launch returning the seaman to his vessel from shore leave. The court denied recovery, holding that the shipowner had no duty to provide crew members with safe transportation to and from the vessel.

Likewise in a case arising in a district court in the Fifth Circuit, *Miles v. United Marine Lines, Inc.*, 325 F. Supp. 1370 (E.D. Tex. 1971), the court concluded that the shipowner owed no duty to provide crew members with safe means of transportation from the vessel to shore and back. The court also concluded that the shipowner's duty to provide a safe place to work does not extend beyond the ship where shore leave is concerned.

Another case arising out of a district court in the Fifth Circuit is in point, *Martinez v. SS "Hawaiian Retailer"*, 1963 A.M.C. 1188 (S.D. Ga. 1963). In *Martinez*, a crew member was injured while leaving the pier area on shore leave. To reach the street, it was necessary for him to cross the pier, proceed through a warehouse on the pier and descend a short ladder from the warehouse to the street. The crew member fell while descending the defective and poorly lighted ladder which was located some 350 to 400 feet from the ship's gangway. Defendant shipowner did not own or operate the pier but had used the pier in question on many previous occasions. The ship had been at the pier for nearly two days before the crew member was injured, and the crew member had never been on the pier before. Even in this posture, however, the shipowner's motion for summary judgment was granted. The court specifically rejected the crew member's claims that the shipowner was negligent in failing to inspect the dock, in failing to provide the crew member with a safe place to disembark, and in providing no other means of egress other than through the warehouse, which had poor lighting, no exit markings, and defective ladders. The court agreed with the shipowner's contentions:

> "1. The shipowner's duty to provide safe egress from the ship for members of the crew is limited to egress from the ship to the dock and does not extend beyond the area in the immediate vicinity of the ship's gangway.
>
> "2. There is no duty imposed by law upon a vessel or its owner to inspect a dock or warehouse area owned and operated by a third party before granting shore leave to crew members and to warn them of any hazards, even when this area must be traversed by the crew in order to get from the ship to the nearest street." 1963 A.M.C. at 1190.

The precise question presented in this appeal has not been directly ruled upon by the United States Supreme Court. This court has, however, cited the Ninth Circuit's *Todahl* case with approval in *Aquilar v. Standard Oil Co.*, 318 U.S. 724, 736-37 (1943), which held that maintenance and cure is available to a crew member injured on shore leave:

> "... Consequently the fact that the shipowner might not be liable to the seaman in damages for the dock owner's negligence, *cf. Todahl v. Sudden & Christenson* (CCA 9th) 5 F(2d) 462, does not relieve him of his duty of maintenance and cure...."

The cases discussed above are illustrative of the wide acceptance of the long-established principles announced by this court in the *Todahl* decision. It is the well-established rule of law that under the facts and circumstances of the instant case: (1) respondent owed no duty to provide petitioner with safe egress beyond the immediate area of the gangway, (2) respondent owed no duty to inspect the pier for the presence of potentially dangerous conditions, (3) respondent owed no duty to warn petitioner of dangerous conditions on the pier, and (4) respondent owed petitioner no duty to provide a reasonably safe place to work. There being no duty on the part of respondent with respect to petitioner's allegations of negligence, there can be no actionable negligence for which respondent can be held liable to petitioner. No duty *which respondent owed to petitioner* was breached. This should end the matter, and the trial court's judgment in favor of respondent should be affirmed.

D.

The Trial Judge and Jury Have Their Respective Functions in Our System of Jurisprudence

No citation of authority is needed to assist in a reflection of the roles played by the judge and jury in a personal injury action such as the one at bar.

Since the action is based on negligence, the trial judge must define for the jury the duties which exist between the parties, the breach of which will constitute such negligence. It is for the *jury,* with such guidlines, to determine, from a review of all of the conflicting evidence, whether such a breach has occurred.

If the judge, from a review of the applicable decisions, determines that a duty did not exist, he can, as a matter of law, and either before or after a full trial, rule for the defendant. In the case at bar this was done after the trial by the entry of a judgment N.O.V.

This action did *not* invade the province of the jurors. There was simply no cause of action which could be properly presented to them.

IV.

CONCLUSION

Respondent suggests that the petitioner has misconceived the function of a petition for certiorari. It is not a forum for the re-argument of the case on the merits, but rather presents the means to convince this court that traditional grounds exist for the granting of the writ.

A conflict of decisions in the various circuits has *not*

been shown. The *importance* of the issues (except as between the individual parties) has *not* been demonstrated.

As stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

It is respectfully submitted that the petition be denied.

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